160 US 452

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~220.~~ 62

W. B. ELDRIDGE, APPELLANT,

vs.

PETER J. TREZEVANT AND HENRY B. RICHARDSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

FILED OCTOBER 21, 1891.

(14,908.)

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W. B. ELDRIDGE, APPELLANT,

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PETER J. TREZEVANT AND HENRY B. RICHARDSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 21, 1895.

a UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Judicial Circuit and Western District of Louisiana.

WILLIAM B. ELDRIDGE
vs.
BOARD OF ENGINEERS *et al.* } No. 181.

Appearances.

For appellant, Wade R. Young, Esqr.
" appellees, Mess. W. H. Rogers, att'y gen. La.
" " Mr. Alfred Goldthwaite.
" " Mess. Luce & Lemle.

1 *Bill of Complaint.*

To the honorable the judges of the circuit court of the United States for the western district of Louisiana:

William B. Eldridge, a resident and citizen of Warren county, Mississippi, brings this his bill against the Board of Engineers of the State of Louisiana, represented by Henry B. Richardson, chief State engineer, a resident of Orleans parish, and against Peter J. Trezevant, contractor, a resident of Caddo parish, and both citizens of Louisiana; and thereupon your orator complains and says:

That he is the owner in fee, by title derived by patent from the United States without reservations, of that certain tract of land and cotton plantation situated in East Carroll parish, Louisiana, near the Mississippi river, about twenty miles below the town of Lake Providence, known as "Fairview," bounded north by "Eureka" and "Carondelet" plantations, south by "Henderson," east by "Raleigh" and "Pecan Grove," and west by "Carondelet" and "Henderson," containing one hundred and seventeen acres, more or less, and of the value of ten thousand dollars; for a more full and particular description of which reference is made to the exhibit annexed to this bill.

That said Board of Engineers, in the exercise of a power conferred on it by the laws of the State, has located a line of public levee through the plantation of your orator herein described, at a distance of more than a half mile from the bank of the Mississippi river, and a contract for the construction of said public levee has been let to said Peter J. Trezevant, his partners and associates, whose names are not known to your orator.

And the said Trezevant, his partners, associates, agents, employees, and servants, are about to enter and trespass upon the said
2 plantation for the purpose of building such public levee, and to take the land for the right of way and barrow pits, and to obstruct the canals and ditches and drains so as to dam up and overflow the lands by preventing the flow of the waters, and to

place thereon superinduced additions of water, earth, sand, and other material, so as to render said plantation unfit for cultivation and habitation and thus to take, damage, and destroy the property of your orator for public purposes without just and adequate compensation.

Your orator says that such taking, damage, and destruction of his property by the engineers and contractor of the State for the purpose of building such public levee is in violation of the prohibition of section one of article fourteen of the Constitution of the United States, that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws.

That article 156 of the state constitution provides that private property shall not be taken nor damaged for public purposes without just and adequate compensation being first paid, but that notwithstanding such prohibition the laws of the State, as interpreted by the State supreme court, provide no remedy for an assessment of just and adequate compensation in such cases, and said court in the case of Bass *vs.* State, 34 Annual, 494, has decided that such taking, damage, and destruction of property for the purpose of building a public levee is an exercise of the police power of the State and *damnum absque injuria*, because the State has a right of servitude or easement over the lands on the shores of navigable rivers for the making and repairing of levees, roads, and other public or common works. C. C., 665.

That the Supreme Court of the United States has decided to the contrary in the case of Pumpelly *vs.* Canal Co., 13 Wallace, 166, that

3 when the United States sells land, by treaty or otherwise, and parts with the fee by patent without reservations, it retains no right to take that land for public use without just compensation, nor does it confer such a right on the State within which it lies, and that the absolute ownership and right of private property in such land is not varied by the fact that it borders on a navigable stream.

That this court in the case of Hollingsworth *vs.* Tensas Parish and other cases has found itself unable to reconcile the conflict of decisions between the Supreme Court of the United States and the State supreme court, and upon the authority of Pumpelly *vs.* Canal Co., *supra*, and other cases, and the general principles of jurisprudence, has decided that such taking, damage, and destruction of land on or near the Mississippi river is not an exercise of the police power and of a right of servitude or easement, and as such *damnum absque injuria*, but can only be had in the exercise of the right of eminent domain and with just and adequate compensation. 17 Federal Reporter, 109.

That notwithstanding such decisions of the Supreme Court and of this court the State courts have refused to conform their jurisprudence and to allow such just and adequate compensation, and the legislature, in the special laws for the locating, making, and repair of levees, has failed and refused to provide any remedy for the assessment of just and adequate compensation in such cases, and

the defendants, who are officers and agents of the State, contend that they have a legal right to enter upon the plantation of your orator and to locate a public levee thereon, and to take, damage, and destroy his property for the purpose of making such levee, and unless restrained by an injunction out of this court will so enter and so take, damage, and destroy his property, of the value of ten thousand dollars, without any compensation whatever.

4 Your orator says that the special laws of the State for the locating, making, and repairing of levees, which permit the said defendants to take, damage, and destroy the property of your orator for the purpose of making such public levee without providing for the payment and assessment of just and adequate compensation, are repugnant to and in conflict with the aforesaid prohibition of section one of article fourteen of the Constitution of the United States and unconstitutional, null, void, and that said defendants in so entering upon his plantation and locating a line of public levee thereon, and in proceeding to take, damage, and destroy his property to make such levee, without just and adequate compensation first paid, are trespassers, without warrant or authority of law, and should be restrained by an injunction out of this court until such just and adequate compensation has been assessed and paid. Head *vs.* Amoskeag Manuf'g Co., 113 U. S., 9; Cherokee Nation *vs.* Southern Kansas R'y Co., May 19th, 1890, U. S. Supreme Court Reporter, vol. 10, *pp.* 965; City of Chicago *vs.* Taylor, 125 U. S., 161.

And your orator says that he cannot sue the State for compensation for the damages so to be inflicted, and that an action at law, if such would lie, would not be that just and adequate compensation first paid contemplated by the aforesaid provision of the State constitution, and that unless the said defendants are enjoined and restrained out of this court from taking or damaging or destroying his property for the purpose of making such public levee until just and adequate compensation shall have been assessed and paid your orator will suffer irreparable loss and injury. Shreveport & Arkansas R'y Co. *vs.* Hollingsworth *et al.*, 7 Southern Report-, 693; Commissioners *vs.* Harkleroads, 62 Miss., 807.

Wherefore, in consideration of the premises, your orator prays for a restraining order, directed to the said board of engineers

5 and to the said Peter J. Trezevant, contractor, enjoining them and each of them, their associates, partners, agents, employees, and servants, from entering and trespassing upon the plantation of your orator, herein described, for the purpose of constructing a public levee, and from taking or damaging or destroying the land of your orator for public purposes without just and adequate compensation being first paid.

And for (writs) and order commanding the said defendants to show cause, at a certain time and place, why a preliminary injunction should not be granted, and upon their failure to show good and sufficient cause to the contrary, a preliminary injunction issue enjoining and restraining the said defendants as above prayed.

And for writs of subpœna directed to the said Board of Engineers and to the said Peter J. Trezevant, commanding them and each of

them, at a certain time and place and under a certain penalty, full, true, and perfect answer to make to all and singular the premises, but not under oath or affirmation, the benefit of which is waived.

And that it may be decreed that the special levee laws of Louisiana empowering the said defendants to locate and make a public levee on the plantation of your orator and to take, damage, and destroy his land for the purpose of making a public levee, and to take, damage, and destroy his property for public purposes without adequate and just compensation being first paid, by the authority of which the said defendants attempt to justify their trespass, are repugnant to and in conflict with the prohibition of section one of the fourteenth amendment to the Constitution of the United States, that no State shall deprive any person of life, liberty, or property without due process of law, because the said laws make no provision for the assessment and payment of just and adequate compensation.

6 And that it may be decreed that the said defendants are trespassers and without warrant of authority of law, and that they be perpetually enjoined as above prayed, and for such other and further relief in the premises as the nature of the circumstances of the case may require.

WADE R. YOUNG, *Solicitor.*

STATE OF MISSISSIPPI, }
Warren County. }

William B. Eldridge, being duly sworn, deposes and says that he is the complainant; that all the facts stated in the foregoing bill are true, and all the conclusions of law he believes to be true.

W. B. ELDRIDGE.

Sworn to and subscribed before me this 21st day of July, A. D. 1890.

W. B. BROOKS,
U. S. Commissioner of the Southern District of Mississippi.

Order.

On reading the foregoing petition it is ordered that a restraining order issued as prayed for on complainants giving sufficient bond in the sum of two thousand dollars, according to law. It is further ordered that the defendants may suspend and are hereby allowed to suspend opperation of the order herein granted complainants on defendants giving bond in the sum of four thousand dollars; that the clerk of this court be authorized and he is hereby directed to take and accept the bond or bonds herein provided for; that this rule and proceeding be made returnable at Monroe, on first day of the October term, A. D. 1890.

ALECK BOARMAN, *Judge.*

7 & 8 Endorsed: No. 181. United States circuit court, western district of Louisiana. W. B. Eldridge *vs.* Board of Engineers *et al.* Bill of complaint. Filed Sept. 16th, 1890. J. B. Beattie, clerk.

9 *Bond for Injunction.*

U. S. Circuit Court, Western District of La. In Equity.

WILLIAM B. ELDRIDGE
vs.
BOARD OF ENGINEERS *et al.* } No. 181.

Know all men by these presents that we, William B. Eldridge, as principal, and M. W. Yerger, as sure*ties*, are held and firmly bound unto the Board of Engineers of the State of Louisiana and unto Peter J. Trezevant in the full sum of two thousand dollars, lawful money of the United States of America; for the payment of which, well and truly to be made, we bind ourselves, our executors, administrators, and heirs, firmly and *in solido* by these presents.

The condition of this obligation is such that whereas the above-bound principal, as complainant in the above-entitled suit, has obtained from the U. S. circuit court for the western district of Louisiana a restraining order, enjoining and restraining the defendants from locating and making a public levee on his property, and from taking or damaging or destroying his said property for public purposes without adequate compensation first paid, upon his furnishing bond and security in the sum of two thousand dollars:

Now, therefore, if he shall well and truly pay such damages as may have been sustained by the defendants in case it should be decided that the injunction has been wrongfully obtained, this
10 bond to be null and void; otherwise to remain of full force and virtue as security for the payment of such damages.

W. B. ELDRIDGE,
By WADE R. YOUNG, *Att'y.*
M. W. YERGER.

Signed, sealed, and delivered in the presence of—

O. S. ROBBINS.
WADE R. YOUNG.

Personally appeared M. W. Yerger, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in East Carroll parish, Louisiana, and is worth the full sum of two thousand dollars over and above all of his debts and liabilities and property exempt from execution.

M. W. YERGER.

Sworn to and subscribed before me September 9th, 1890.

L. M. LOWENBURG,
U. S. Commissioner for the Southern District of Mississippi.

Approved September 16th, 1890.

J. B. BEATTIE, *Clerk.*

Endorsed: No. 181. U. S. circuit court, west. dist. of La. W. B. Eldridge *vs.* Board of Engineers *et al.* Bond for injunction. Filed Sept. 16th, 1890. J. B. Beattie, clerk.

11 *Extract of Minutes.*

MONDAY, *October 6th*, 1890.

Court met pursuant to adjournment.

Present: His Hon. Aleck Boarman, dist. judge, presiding.

W. B. ELDRIDGE
vs.
BOARD OF ENGINEERS *et al.* } No. 181.

On motion of Wade R. Young, solicitor for complainant, it is ordered that this cause be heard before the Hon. L. Q. C. Lamar, circuit justice, on the third Monday of October, A. D. 1890, as provided by section 611 of the Revised Statutes.

12 *Restraining Order.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, 5th Circuit, Western District of Louisiana.

WILLIAM B. ELDRIDGE
vs.
BOARD OF ENGINEERS *et al.* } No. 181.

The President of the United States to Peter J. Trezevant, Greeting:

Whereas it has been represented unto us, in our said circuit court, on the part of William B. Eldridge, a citizen of the State of Mississippi, in a bill in equity lately exhibited against you, Peter J. Trezevant, touching certain matters and things therein set forth; and whereas the Honorable Aleck Boarman, one of the judges of our said court, upon due consideration thereof, has made and allowed an order in said cause whereby you, Peter J. Trezevant, were required to show cause, at Monroe, Louisiana, on the 6th day of October, A. D. 1890, why an injunction should not issue as prayed for in said bill of complaint; and whereas the said judge has granted and allowed an order restraining you, Peter J. Trezevant, immediately and forthwith and during the pendency of said motion for an injunction to the full extent and effect as prayed for in said bill of complaint:

Now, therefore, in consideration of the premises and of the allegations in said bill of complaint contained, you, the said Peter J. Trezevant, your attorneys, associates, partners, agents, employees, and servants, and each of you, are hereby commanded and strictly enjoined, under the penalty of the law, that you and each of you absolutely refrain and desist from entering and trespassing upon the

"Fairview" plantation of the complainant, William B. El-
13 dridge, in East Carroll parish, Louisiana, for the purpose of locating and constructing a public levee, and from taking or damaging or destroying the property of the said William B. Eldridge for public purposes without just and adequate compensation being first paid.

And you, the said Peter J. Trezevant, your attorneys, associates, partners, agents, employees, and servants, and each of you, remain so inhibited and restrained until the further order of our said court in the premises.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of United States, this the 20th day of Octo-
[SEAL.] ber, in the year of our Lord one thousand eight hundred and ninety.

J. B. BEATTIE, *Clerk.*

Endorsed: No. 181. U. S. circuit court, 5th circuit, western district of Louisiana. William B. Eldridge *vs.* Board of Engineers *et al.* Restraining order.

Marshal's Returns.

Received the within restraining order in office, at Shreveport, La., on the 20th day of October, 1890, and on the 23rd day of October, 1890, I made service by leaving a certified copy of within order in the hands of J. H. Snyder, at Henderson, La., in Madison parish, he being the commissary clerk of P. J. Trezevant.

A. H. BERNSTEIN,
U. S. Deputy Marshal.

14 Filed Oct. 24th, 1890.

J. B. BEATTIE, *Clerk.*

Bond for Dissolution of Injunction.

Know all men by these presents that we, The State Board of Engineers, per Henry B. Richardson, chief State engineer, and Peter J. Trezevant, as principals, and Michael P. Erwin, Jacob Stein, Jas. I. McClellan, Geo. W. Montgomery, Friend L. Maxwell, Albert S. Coltharp, Wm. G. Wyly, Jas. H. Gilfoil, Geo. C. Waddill, as sureties, are held and firmly bound unto William B. Eldridge, plaintiff, his heirs, executors, administrators, and assigns, in the sum of four thousand ($4,000.00) dollars; for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated on this the 7th day of November, in the year of our Lord one thousand eight hundred & ninety.

Whereas the above-bounden Henry B. Richardson, as chief engineer aforesaid, and Peter J. Trezevant have filed this bond to set aside a writ of injunction issued by the honorable circuit court for the 5th circuit of Louisiana in the matter of William B. Eldridge *vs.* Board of Engineers *et al.*, No. 181 of said court:

Now, the condition of the above obligation is such that the above-bounden Henry B. Richardson, as chief engineer aforesaid, and Peter J. Trezevant, as principals, and Michael P. Erwin, Jacob Stein, Jas. T. McClellan, Geo. W. Montgomery, Friend L. Maxwell, Albert S. Coltharp, Wm. G. Wyly, Jas. H. Gilfoil, and Geo. C. Waddill, as sureties, shall well and truly pay such damages as may be lawfully incurred if said writ shall have been lawfully obtained; otherwise to be null & of no effect.

THE BOARD OF STATE ENGINEERS,
Per HENRY B. RICHARDSON,
Chief State Engineer.
PETER J. TREZEVANT, *Contractor.*
15 M. P. ERWIN.
J. STEIN.
JAMES T. McCLELLAN.
GEO. W. MONTGOMERY.
F. L. MAXWELL.
A. S. COLTHARP.
W. G. WYLY.
J. H. GILFOIL.
GEO. C. WADDILL.

Personally appeared before me, the undersigned authority, Michael P. Erwin, Jacob Stien, Jas. T. McClellan, Geo. W. Montgomery, Friend L. Maxwell, Albert S. Coltharp, Wm. G. Wyly, Jas. H. Gilfoil, and Geo C. Waddill, who, being duly sworn, depose and say that they are the sureties on the within bond; that they all reside in the parishes of East Carroll and Madison, State of Louisiana, and they are well worth the sum of four thousand ($4,000.00) dollars over and above all of their just debts and liabilities and property exempt from execution under the laws of the State of Louisiana.

M. P. ERWIN.
J. STIEN.
JAMES T. McCLELLAN.
F. L. MAXWELL.
GEO. W. MONTGOMERY.
A. S. COLTHARP.
W. G. WYLY.
J. H. GILFOIL.
GEO. C. WADDILL.

Sworn to and subscribed before me this the 7th day of November, A. D. 1890.

F. F. MONTGOMERY,
Judge 8th Jud. Dist.

STATE OF LOUISIANA, }
Parish of Madison. }

I, James W. Clemens, clerk of the 8th judicial district court of the State of Louisiana in and for the parish of Madison, do hereby certify that the Hon. F. F. Montgomery, whose genuine signature

appears to the foregoing affidavit, was at the date thereof,
16 November 7th, 1890, judge of the said court, sole and presiding, and his acts as such are entitled to full faith and credit.

Witness my official signature and the seal of said court this the 7th day of November, A. D. 1890.

J. W. CLEMENS,
Clerk ad Interim.

Approved Nov. 13th, 1890.

ALECK BOARMAN, *Judge.*

Endorsed: U. S. circuit court, W. D. La. W. B. Eldridge *vs.* Board of Engineers *et al.* No. 181. Bond for dissolution of injunction. Filed Nov. 13th, 1890. J. B. Beattie, clerk.

Extract of Minutes.

APRIL, *Monday, 13th,* 1891.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, dist. judge, presiding.

W. B. ELDRIDGE
vs.
BOARD OF ENGINEERS *et al.* } No. 181.

On motion of Wade R. Young, solicitor for complainant, and with consent of Alfred Goldthwaite, Esqr., solicitor for defendants, it is ordered that this cause be heard before a full bench, in the city of New Orleans, La., at such time as may be agreed upon by the judges of this court.

17 *Answer.*

U. S. Circuit Court, Western District of Louisiana. In Equity.

WILLIAM B. ELDRIDGE
vs.
BOARD OF STATE ENGINEERS *et al.* } No. 181.

To the judges of the United States circuit court for the western district of Louisiana:

The answer of the Board of State Engineers, through Henry B. Richardson, chief engineer, and Peter J. Trezevant, defendants, to the plaintiff's bill of complaint, respectfully represents:

1. That the Board of State Engineers was created by an act of the General Assembly of the State of Louisiana approved February 14th, 1879, known as act No. 33 of the acts of 1879.

That by said act it is made the duty of said engineers to make careful survey of the water-courses and public works and levees of the State, said survey to be completed as soon after the subsidence of high water as practicable, in order that the contracts for work

may be let out and commenced at the earliest moment possible. They shall report to the governor of the State the improvements necessary and the levees to be constructed, which are of prime importance to the State at large and are beyond the means of parochial authorities. They shall also in said report furnish estimates and specifications of work necessary to be done.

That, upon the receipt of said report, by said act it is made the duty of the governor of the State of Louisiana to advertise for proposals to make such improvements and construct such levees as are recommended, and to award the contracts to the lowest responsible bidders, under proper and sufficient bonds for the faithful performance of their contracts; that upon completition of said
18 works it is made the duty of the board of State engineers or the engineer in charge to examine and measure said work and to certify to the correctness of said work, and, upon the approval of the governor, the auditor of public accounts of the State must draw his warrant therefor, payable out of the general engineer fund or such fund as is provided by law.

2nd. That the said board of State engineers are public officers of the State; that their duties are prescribed by the laws aforesaid and the laws creating the different levee districts of the State of Louisiana; that they are not a judicial body and exercise no judicial functions, but merely aid the governor of the State in the proper administration, protection, the improvement of levees necessary, and the levees to be constructed and repaired which are of prime importance to the State at large and the different levee districts and parishes, to furnish estimates and specifications of work necessary to be done, and to further report upon the work when examined and measured after completion, and to perform all engineering work required of them.

3rd. Respondents further aver that the said board of State engineers in the discharge of the duties devolving upon them by law honestly and conscientiously and not acting in any arbitrary or unjust spirit performed their duty for the best interests of the State at large, reported to the governor of the State, and furnished estimates and specifications of the work necessary to be done on and across the plantation "Fairview," alleged to be the property of plaintiff and which is expressly denied; that the levee to be constructed was one of prime importance to the State at large, of large size, and that the river front was a dangerous and constantly caving bank, and that necessarily the levee had to be located some distance from the river and the impending danger of the caving
19 bank and a disasterous overflow of the waters from the river; that in the same year, to wit, 1890, a disasterous flood had inundated all that section of the State by the breaking of the "Raleigh" plantation levee, the eastern boundary of plaintiff's alleged plantation.

4th. Respondents aver that the governor of the State, in compliance with law aforesaid, did award the contract for constructing the levees recommended, with estimates and specifications, by said board of State engineers to the respondent Peter J. Trezevant, under good

and sufficient bonds, as the lowest responsible bidder; that this respondent was proceeding with the work when enjoined by this suit of plaintiffs. Respondents aver that since the said injunction was bonded the work has been completed and accepted by the State.

5. Respondents deny that they or any one of them are trespassers or have trespassed upon the property right of the plaintiff, or that he has been legally damaged. If plaintiff has suffered any wrong it has been *damnum abseque injuria;* that if any property has been taken or damaged in the progress and completion of the levee of plaintiff's plantation the first section of the 14th amendment of the Constitution of the United States does not apply, nor has it been contravened and violated; and further deny that *thr* article 156 of the constitution of the State of Louisiana has been violated, but respondents have been informed and believe and so aver that the plaintiff at the time of the work done by them held and now holds the said property, which is adjacent to the Mississippi river, subject to a servitude imposed by the laws of the State of Louisiana for public utility, and that the construction of the levees of prime importance in the State, to the State at large, is a matter within the police power of the State and vital to the welfare and protection of the lives and property of the people of Louisiana.

Wherefore th-se defendants having fully answered plain-
20 tiff's bill of complaint, they pray that it be dismissed at plaintiff's cost, and that the injunction heretofore granted and bonded be dissolved; and, as in duty bound, they will ever pray, etc.

HENRY B. RICHARDSON,
Chief State Engineer, for the Board of State Engineers.
PETER J. TREZEVANT.

W. H. ROGERS,
Att'y Gen. La.
ALFRED GOLDTHWAITE,
Of Counsel for Def'ts.

THE STATE OF LOUISIANA, }
City of New Orleans. }

On this the 1st day of May, 1891, before me personally appeared *before me* Henry B. Richardson and made oath that he has heard the above answer read; that it was subscribed by him; that he knows the contents thereof, and that the same is true of his own knowledge except as to matters which are therein stated to be on his own information and belief, and as to those matters he believes them to be true.

OCTAVE MOREL,
Notary Public.

[SEAL.]

THE STATE OF LOUISIANA, }
City of New Orleans. }

On this the 4th day of May, 1891, before me personally came Peter J. Trezevant, who made oath that he has heard read the above answer

subscribed by him; that he knows the contents thereof, and that the same is true of his own knowledge except as to those matters stated upon information and belief, and as to those matters he believes them to be true.

OCTAVE MOREL,
Notary Public.

21 Endorsed: No. 181. United States circuit court, western district of Louisiana. William B. Eldridge *vs.* Board of State Engineers *et al.* Answer. Filed May 8th, 1891. J. B. Beattie, clerk.

22 *Agreement.*

U. S. Circuit Court, Western Dist. of La. In Equity.

WILLIAM B. ELDRIDGE
vs.
BOARD OF ENGINEERS *et al.* } No. 181.

It is agreed by and between counsel for plaintiffs and defendants in this suit that the cause shall be tried upon the issues of law presented by the bill and answer and the admission that none of the acts complained of in the bill were wanton, malicious, or arbitrary on the part of the defendants or any of them; and, further, the denial of ownership in the Eldridge case is waived.

And, further, it is agreed that the case shall be heard as if upon the sufficiency of the answer filed, waiving the denial of fact contained in the answer, if any, for the purposes of this trial.

23 WADE R. YOUNG,
For Complainant.
W. H. ROGERS, *Att'y Gen.*
LUCE & LEMLE,
For Parish of Concordia.
ALFRED GOLDTHWAITE,
Of Counsel for Def'ts.

Endorsed: No. 181. U. S. circuit court, western district of La. Agreement. Filed June 18th, 1891. J. B. Beattie, clerk.

24 *Decree.*

United States Circuit Court, Western District of Louisiana.

WILLIAM B. ELDRIDGE
vs.
BOARD OF ENGINEERS *et al.*

Before the circuit justice and circuit judge.

This cause came on to be heard before the circuit justice and circuit judge upon an order made by the court by consent of parties that it should be heard before a full bench, in the city of New Orleans, at such time as may be agreed upon by the judges of the court and upon the agreement of parties in writing in the following terms:

"It is agreed by and between counsel for plaintiffs and defendants in these suits that the causes shall be tried upon the issues of law presented by the bills and answers and the admission that none of the acts complained of in the bills were wanton, malicious, or arbitrary on the part of the defendants or any of them; and, further, the denial of ownership in the Eldridge case is waived.

"And, further, it is agreed that the cases shall be heard as if upon the sufficiency of the answers filed, waiving the denials of fact contained in the answers, if any, for the purposes of this trial."

And was argued by Wade R. Young, Esqr., solicitor for complainant, and by Hon. W. H. Rogers, attorney general of the State of Louisiana, and Alfred Goldthwaite, Esqr., solicitors for defendants.

Upon consideration whereof, the judges being of opinion that the matters and things, including damages, complained of in the bill of complaint are, under the jurisprudence of Louisiana, *damnum abseque injuria*, and that the answer filed by the defendants in the said cause is sufficient in law, and the said judges finding
25 the issues of law presented by the bill and answer in favor of the defendants—

It is ordered, adjudged, and decreed that the answer filed by the defendants in the said cause be, and the same is hereby, adjudged sufficient and all objections thereto are overruled; and it is further ordered, adjudged, and decreed that the complainant's bill be dismissed with costs.

June 20th, 1891.

LUCIUS Q. C. LAMAR,
Circuit Justice.
DON A. PARDEE,
Circuit Judge.

Endorsed: No. 181. United States circuit court, 5th circuit, western district of Louisiana. Wm. B. Eldridge *vs.* Board of Engineers *et al.* Decree. Filed June 20th, 1891. J. B. Beattie, clerk.

Agreement.

U. S. Circuit Court, Western District of La.

W. B. ELDRIDGE
vs.
THE BOARD OF STATE ENGINEERS *et al.*

In these cases it is stipulated and agreed that the decree shall be rendered, signed, and enrolled in vacation, and that either
26 party shall have the right to appeal with supersedeas within sixty days after notice of the decree.

WADE R. YOUNG,
Solicitor for Complainants.
W. H. ROGERS, *Att'y Gen.*
LEMLE & LUCE,
Per W. H. ROGERS,
For Police Jury, Pa. Concordia.
ALFRED GOLDTHWAITE,
Of Counsel for Def'ts.

Endorsed: No. 181. U. S. circuit court, 5th circuit, western district of Louisiana. Wm. B. Eldridge *vs.* Board of Engineers *et al.* Agreement of counsel. Filed June 25th, 1891. J. B. Beattie, clerk.

Petition for Appeal.

U. S. Circuit Court, Western District of Louisiana. In Equity.

W. B. ELDRIDGE
vs.
BOARD OF STATE ENGINEERS *et al.* } No. 181.

The complainant prays for appeal, returnable to the Supreme Court of the United States, to have the decree rendered in this cause reviewed and reversed, and for cause of error assigns:

1. That the court erred in deciding that the State, for the
27 purpose of making or repairing public levees, and the United States, for the purpose of improving the navigation of the Mississippi river, can take, damage, and destroy private property without compensation.

2. That the court erred in deciding that the lands of complainant which are admitted to be held by titles in fee from the United States without reservation are subject to an easement or servitude in favor of the State or the United States for the making or repairing of public levees and for the improvement of the navigation of the Mississippi river, and that the State, in the exercise of its police power, can take, damage, and destroy his said lands for such purpose without compensation.

3. That the court erred in deciding that the levee laws of the State, which are relied on by defendants, as construed by the courts of the State, to authorize the taking, damage, and destruction of private property for public purposes without compensation are not repugnant to and in conflict with the prohibition of the fourteenth amendment of the Constitution of the United States, that no State shall deprive any person of property without due process of law.

WADE R. YOUNG, *Solicitor.*

Allowed.
DON A. PARDEE,
Circuit Judge.

Endorsed: No. 181. U. S. circuit court, 5th circuit, western dist. La. W. B. Eldridge *vs.* Board of State Engineers *et al.* Petition for appeal. Filed Aug. 15th, 1891. J. B. Beattie, clerk.

28 *Bond for Appeal.*

UNITED STATES OF AMERICA:

Know all men by these presents that we, W. B. Eldridge, as principal, and M. W. Yerger, as surety, are held and firmly bound, jointly and severally, unto the Board of State Engineers of the State of Louisiana, by Henry B. Richardson, chief engineer, and unto

Peter J. Trezevant in the sum of one thousand dollars, lawful money of the United States of America, to be paid to them, their heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 18th day of July, A. D. 1891.

Whereas the said W. B. Eldridge having heretofore, to wit, on the — day of ——, 1891, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 20th day of June, 1891, by the circuit court of the United States for the fifth circuit, holding sessions in and for the western district of Louisiana, in the suit of W. B. Eldridge *vs.* Board of State Engineers *et al.*, No. 181 of the docket thereof:

Now, the condition of the above obligation is that if the above-bounden principal shall prosecute his said appeal to effect and shall answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

W. B. ELDRIDGE,
By WADE R. YOUNG, *Att'y.*
M. W. YERGER.

Signed, sealed, and delivered in the presence of—
W. P. COFFEY.

The above bond accepted and surety approved.
Aug. 10th, 1891.

DON A. PARDEE,
Circuit Judge.

29 UNITED STATES OF AMERICA,
Western District of Louisiana.

Personally appeared M. W. Yerger, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in Richland parish, Louisiana, and is worth the full sum of one thousand dollars over and above all his debts and liabilities and property exempt from execution.

M. W. YERGER.

Subscribed and sworn before me this 18th day of July, 1891.

G. WILSON WRIGHT, *J. P.*

Endorsed: No. 181. U. S. circuit court, 5th circuit, W. D. La. W. B. Eldridge *vs.* Board of State Engineers *et al.* Bond for appeal. Filed Aug. 15th, 1891. J. B. Beattie, clerk.

30 *Citation of Appeal.*

THE UNITED STATES OF AMERICA:

Circuit Court of the United States for the Western District of Louisiana.

The President of the United States to Peter J. Trezevant, of Shreveport, Louisiana, and Henry B. Richardson, of New Orleans, Louisiana, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, in the city of Washington, on the second Tuesday of September next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and western district of Louisiana, wherein W. B. Eldridge is appellant, to show cause, if any there be, why the decree rendered against the said W. B. Eldridge, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of August, A. D. 1891.

DON A. PARDEE,
Circuit Judge.

[Endorsed:] No. 181. U. S. circuit court, 5th circuit, western dist. La. W. B. Eldridge *vs.* Board of State Engineers *et al.* Original citation of appeal.

31 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Western District of Louisiana.

The President of the United States to Henry B. Richardson, Esqr., chief State engineer, New Orleans, Louisiana, Greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States, to be holden at the city of Washington, D. C., on the second Tuesday in September next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and the western district of Louisiana, wherein W. B. Eldridge is appellant and The Board of State Engineers are appellees, to show cause, if any there be, why the judgment rendered against the said W. B. Eldridge, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal U. S. Circuit Court for the Western Dist. of La.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of August, in the year of our Lord one thousand eight hundred and ninety-one.

DON A. PARDEE,
Circuit Judge.

A true copy.
Attest:

J. B. BEATTIE, *Clerk.*

[Endorsed:] United States circuit court, western district of Louisiana. No. 181. W. B. Eldridge *vs.* Board of State Engineers *et al.* Citation of appeal.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., Aug. 19th, '91, & on the 26th day of Aug't, '91, I served a true copy of the within citation of appeal on Henry B. Richardson, chief State engineers, by handing the same to him in person at his office, No. 2 Cotton Exchange building, in the city of New Orleans, La., & leaving the same in his hands.

J. B. DONNALLEY,
U. S. Marshal,
By J. E. BOEHLER,
D'y U. S. Marshal.

I, John E. Boehler, being duly sworn, deposes and says that he is a lawful deputy United States marshal for the eastern district of Louisiana, and that the foregoing service was made by him in the manner set forth in the above return.

JOHN E. BOEHLER.

Sworn to & subscribed to before me this 27th Aug., 1891, at New Orleans, La.

{ Seal Emmet D. Craig, Commissioner of }
{ U. S. Circuit Court, Dist. of La. }

EMMET D. CRAIG,
Com'r U. S. Circuit Court, East. Dist. La.

32 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Western District of Louisiana.

The President of the United States to Peter J. Trezevant, Shreveport, La., Greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States, to be holden at the city of Washington, D. C., on the second Monday of September next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and the western district of Louisiana, wherein W. B. Eldridge is appellant and The Board of State Engineers *et al.* are appellees, to show cause, if any there be, why the judgment rendered against the said W. B. Eldridge, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal U. S. Circuit Court for the Western Dist. of La.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of August, in the year of our Lord one thousand eight hundred and ninety-one.

DON A. PARDEE, *Judge.*

A true copy.
Attest:

J. B. BEATTIE, *Clerk.*

3—330

[Endorsed :] United States circuit court, western district of Louisiana. No. 181. W. B. Eldridge *vs.* Board of State Engineers *et als.* Citation of appeal.

Marshal's Return.

Received in office August 15th, 1891, and on same day of same month and year I served a true copy of the within citation of appeal on Peter J. Trezevant by handing the same to him in person, at Shreveport, La., in the drug store of L. M. Carter, corner Texas and Spring street-, and leaving the same in his hands.

JOHN VIGNEAUX,
U. S. Marshal, Western District of La.
A. H. BERNSTEIN,
D'y U. S. Marshal.

I, A. H. Bernstein, being duly sworn, deposes and says that he is a lawful deputy United States marshal for the western district of La., and that the foregoing service was made by him in the manner set forth in the above return.

A. H. BERNSTEIN.

Sworn to and subscribed before me this the 15th day of August, 1891, at Shreveport, La.

[Seal U. S. Circuit Court for the Western Dist. of La.]

J. B. BEATTIE, *Clerk.*

33 *Clerk's Certificate.*

UNITED STATES OF AMERICA :

Circuit Court of the United States, Fifth Circuit and Western District of Louisiana.

CLERK'S OFFICE.

I, J. B. Beattie, clerk of the circuit court of the United States for the fifth circuit and western district of Louisiana, do hereby certify that the foregoing 29 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of William B. Eldridge *vs.* Board of Engineers *et al.*, No. 181 of the docket of the said court.

Witness my hand and the seal of said court, at the city of Shreveport, La., this 5th day of September, A. D. 1891.

[Seal U. S. Circuit Court for the Western Dist. of La.]

J. B. BEATTIE, *Clerk.*

I, Aleck Boarman, United States judge for the western district of Louisiana, do certify that J. B. Beattie, whose name is signed to the

above certificate as clerk of the circuit court of the United States for the fifth circuit and western district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of Shreveport, La., in said district, this 5th day of September, A. D. 1891.

ALECK BOARMAN, *Judge.*

Endorsed on cover: Case No. 14,908. W. Louisiana C. C. U. S. Term No., 330. W. B. Eldridge, appellant, *vs.* Peter J. Trezevant and Henry B. Richardson. Filed October 21st, 1891.

Office Supreme Court, U. S.
FILED.
APR 27 1895
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

WM. B. ELDRIDGE,
vs.
BOARD OF ENGINEERS, ET. AL. } No. 330

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF LOUISIANA.

BRIEF OF COMPLAINANT AND APPELLANT.

SUPREME COURT OF THE UNITED STATES.

WM. B. ELDRIDGE,
vs.
BOARD OF ENGINEERS, ET. AL. } No. 330.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF LOUISIANA.

BRIEF OF COMPLAINANT AND APPELLANT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

MAY IT PLEASE YOUR HONORS: This is a bill for an injunction to have the defendants, officers and agents of the State, restrained from taking, damaging and destroying the property of the complainant, for the purpose of making a public levee, until just and adequate compensation shall have been assessed and paid, on the ground that the levee laws of the State, which as construed by the courts of the State, permit the taking of private property for the purpose of making and repairing public levees, without compensation, are repugnant to and in conflict with the prohibition of Section One of the Fourteenth Amendment of the Constitution of the United States, that no State shall deprive any person of life, liberty, or property without due process of law. The defendants have answered that if plaintiff has suffered any wrong, it has been *damnum absque injuria*: that if any property has been taken or damaged in the progress and completion of the levee of plaintiff's plantation, the first section of the Fourteenth Amendment of the Constitution of the United States does not apply;

and that Article 156 of the State Constitution has not been violated, but that plaintiff holds his property, which is adjacent to the Mississippi river, subject to a servitude imposed by the laws of Louisiana, for public utility, and that the construction of the levees is a matter within the police power of the State.

By stipulation of parties, all denials of fact were waived, and the cause was heard on the issues of law presented by the bill and answer.

The Judges rendered a decree for the defendants, dismissing the bill for the reason assigned, that the damages complained of in the bill, are, under the jurisprudence of Louisiana, *damnum absque injuria.*

No written opinion was delivered.

The complainant has appealed, and for cause of error assigned :

1. That the Court erred in deciding that the State, for the purpose of making and repairing public levees, and the United States, for the purpose of improving the navigation of the Mississippi river, can take, damage and destroy private property without compensation :

2. That the Court erred in deciding that the lands of complainant, which are admitted to be held by titles in fee from the United States without reservations, are subject to an easement or servitude in favor of the State, or the United States, for the making and repairing of public levees, or for the improvement of the navigation of the Mississippi river, and that the State, in the exercise of the police power, can take, damage and destroy his said lands, for such purpose, without compensation.

3. That the Court erred in deciding that the levee laws of the State, which are relied on by defendants, as construed by the courts of the State, to authorize the taking, damage and destruction of private property for public purposes without compensation, are not repugnant to and in conflict with the prohibition of the Fourteenth Amendment of the Constitution of the United States, that no State shall deprive any person of property without due process of law.

ARGUMENT.

Article 156 of the Constitution of Louisiana, adopted July 23, 1879, provides that private property shall not be taken nor damaged for public purposes without just and adequate compensation being first paid.

In construing this prohibition, in Ruch vs. New Orleans, 43 Louisiana Annual, the State Supreme Court said: "In view of the tenor of our decision of the first branch of this case, and the authorities cited, it is evident that our conclusion will be that the city was authorized to take the plaintiff's property, to the extent same may be required for public use, in the enlargement of the public roadway immediately in front of it; and this she may do in virtue of the right of appropriation vested in her by the police power of the State. This right of appropriation, which is recognized in the quoted provisions of the Code, is and was co-existent with the right of expropriation, as provided for in Rev. Civil Code, Art. 2626 et seq., and Rev. St. 1479 et seq. All of those provisions pre-existed the Constitution with the 155th and 156th articles of which the right of appropriation is said to conflict. This, of itself, leads to the supposition of their entire compatibility. But the two principles are of well recognized and ancient origin,—one being an exercise of the police power, any loss sustained thereby entitling the injured party to no recompense, the same being *damnum absque injuria*; the other being the exercise of the right of eminent domain, the damages entailed being compensable. Bass vs. State, 34 La., An. 494; Chaffee vs. Trezevant, 38 La., An. 746."

In ordinary cases this interpretation would be binding on this Court, but in determining whether the laws of a State are in conflict with the prohibitions of the Federal Constitution, this Court must decide for itself, and if the decision requires a construction of State Constitutions and laws, it is not necessarily governed by previous decisions of the State courts. V. S. & P. R. R. Co. vs. Dennis, 116 U. S., 665.

The prohibition of the State Constitution is apparently plain and free from ambiguity, and, although Articles 213 et seq. provide for a levee system in the State, no exception

to the prohibition is to be found in the Constitution itself. This exception, says the Court, is to be found in Article 665 of the Civil Code: "Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works. All that relates to this kind of servitudes is determined by laws or particular regulations."

This statute is held to control the prohibition of the Constitution, because it pre-existed, and to authorize the taking, damage and destruction of private property for the making and repairing of levees, roads and other public or common works, without compensation, in the exercise of the police power of the State.

Article 258 of the Constitution provides that all laws in force at the time of the adoption of the Constitution and not inconsistent therewith, shall continue as if the said Constitution had not been adopted, and it would seem that the will of the people should be sought in the Constitution itself, and not in the laws in force at the time of its adoption, which were continued only in so far as they were not inconsistent therewith.

If it had been intended by the framers of the Constitution that the making and repairing of levees, roads and other public or common works should be excepted from the operation of the prohibition, it would have been the usual and simple course to insert a proviso.

The prohibition against the taking of private property for public use is to be found in the Federal Constitution, and in the constitutions of most, if not all of the States, and has received a uniform interpretation, which has become a part of the jurisprudence of the country.

It was alluded to by this Court in Pumpelly vs. Canal Co., as a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, and this Court quoted

the language of Dayton, J. in Sinnickson vs. Johnson: " that this power to take private property reaches back of all constitutional provisions : and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power: that the one is inseparably connected with the other : that they may be said to exist, not as separate and distinct principles, but as part of one and the same principle." 13 Wallace, 166.

The State Court seems to have appreciated this difficulty, and to have disposed of it by giving the thing another name, and justifying the taking as an exercise of the police power, entirely compatible with the right of expropriation, and provided by the statute for the making and repairing of levees, roads and other public or common works.

It becomes necessary, then, or interesting, to inquire into the origin and history of the servitude. The article was taken from Articles 649-650 of the Napoleon Code : " Servitudes established by law have for object the public or communal utility, or the utility of private persons.

Those established for the public or communal utility have for object the tow-paths along the navigable or floatable rivers, the construction or repairing of roads and other public or communal works.

All that concerns this kind of servitude is determined by laws or particular regulations."

The laws which formerly regulated this servitude have been long repealed, as the necessity therefor ceased to exist, and nothing remains of the legislation except the principle embodied in the article of the Code.

The Acts of 1829, Sec. 5, (Revised Statutes of 1856, p. 481), provided " Throughout all that portion of the State watered by the Mississippi and the bayous running to and from the same, which are settled, where levees are necessary to confine the waters, and to protect the inhabitants against inundation, the said levees shall be made by the riparian proprietors, in the proportions and at the time hereinafter prescribed."

This had been the law and public policy of the territory before its purchase, and up to that time, and was the

condition of the ancient grants. Such a policy was doubtless well adapted to a primitive people dwelling along the shores of the river and the bayous running to and from the same, and almost without the restraints of constitutional law. The safety of each front proprietor required not only the construction of a levee on his own land, but also on that of his neighbor, and each levee was considered as the continuation of one great plan, for the preservation of the cultivated fields of the inhabitants, or of those that might be brought into cultivation. Cash vs. Whitmore, 13 Annual 402.

The Constitution of 1812 imposed no restriction on the right of the Legislature to take private property for public use without compensation, and in that respect its will was sovereign.

As the State progressed in population and wealth and intelligence the system was found to be unequal and oppressive, or inadequate to the needs of the public, and it was enacted as early as 1829, Revised Statutes of 1856, p. 501, that "The police juries of the parishes of Concordia and Ouachita (then embracing all that part of the State between the Ouachita and Mississippi rivers), shall have plenary and unlimited power to make such enactments with regard to roads and levees within their respective limits as may be deemed necessary and proper by those bodies, including the power to authorize the assessment and collection of taxes which they may deem necessary on the private land claims within any levee district established by them, to cover the expenses of leveeing any public land included in such district, or other necessary work or expense authorized by any ordinance of said juries respectively.

Sec. 219. If, in the exercise of the powers granted by the foregoing section, the police juries of the parishes of Concordia or Ouachita find it necessary to stop the natural drain of one or more tracts of land, in order to protect several other tracts, or a considerable district of country, they shall have power to do so. If any individual, the natural drainage of whose land shall have been so authorized to be stopped, should deem himself damaged thereby, he may, at the same or at the next regular meeting of the said police jury, claim indemnity therefor."

The principle of indemnity for damage so inflicted was thus early recognized by the legislature.

In the Constitution of 1845, Art. 109, the people first adopted in their organic law the provision that "vested rights should not be divested, unless for purposes of public utility, and for adequate compensation previously made." In 1848 the Legislature enacted (Revised Statutes of 1856, p. 496), "Whenever it shall be necessary to make a new levee in the parish of Tensas, and the persons on whose lands the same may be laid off, shall feel themselves agrieved or injured thereby, the police jury shall appoint a jury of five disinterested freeholders of a different levee ward, who shall examine on oath, and report to the police jury the amount of damage that may be done the complainants, and the benefit also that may arise from the constructian of the levee, and if it appear that the amount of damage is greater than the benefit accruing, the difference shall be paid out of the levee fund within a reasonable time after the report of the jury, and any person refusing to act as one of the jurymen in this section shall be fined fifty dollars." Inge vs. Police Jury, 14 Annual 117.

This enactment was a legislative recognition of the right to compensation to the full extent, and an abandonment of the principle of servitude.

The Constitution of 1852, Article 105, contained the same provision that "vested rights should not be divested, unless for purposes of public utility, and for adequate compensation previously made."

In Zenor vs. Concordia Parish, 7 Annual 150, and Dubose vs. Levee Commissioners, 11 Annual 165, the Court adhered to the doctrine of servitude, and in the latter case held that, although the property was considerably impaired in value, the law concerning the expropriation of private property for public use did not apply to such lands upon the banks of navigable rivers as may be found necessary for levee purposes. In neither case was any allusion made to the constitutional provision against the divestiture of vested rights without compensation. In the case of Mithoff, vs. Carrollton, 12 Annual, 185, the Court seems, for the first time, to have recognized the constitutional provision, and, by a divided court with a strong dissenting

opinion, without abandoning the doctrine of servitude distinguished, and held that the soil alone owed the servitude, and that when it became necessary to construct a levee on ground on which buildings had been erected, and the buildings had been demolished for that purpose, the owners were entitled to be compensated for their value. In Cash vs. Whitmore, 13 Annual, 401, the Court said: "It is unjust that improvements should be made at the expense of one individual when he is not to be benefited by them, and when they are created, not for his good, but for that of the State, or persons who may own land on a bayou, or in its vicinity. Money is taken from him, without an equivalent, to enrich others. Such a system strikes at the very foundation of the rights of property, and cannot be enforced in any nation which respects justice and individual rights. The principle of such a system would be to make great ameliorations, benefiting a large number of people at the expense of the few who might own property in the immediate vicinity of the works requisite to effect these improvenents." It seems to have been considered that the servitude of the Code could not be exercised unless there was some corresponding benefit.

In Inge vs. Police Jury, 14 Annual 117, the Court, interpreting the Act of 1848, held that damages could be allowed for the destruction of that space which is between the old and new levees, for it would be exposed to inundation. It thus appears that, so far from it having been the settled policy of the State that property on the shores of navigable rivers could be taken, damaged or destroyed for the making and repairing of levees without compensation; the Legislature, as early as 1829, provided for indemnity for damages caused by the stopping of natural drains, and in 1848 provided for the payment of all damages caused by the making of new levees.

It is true that these enactments were local, but they indicate the progress of the State towards a proper respect for justice and individual rights. In the same way, it appears that so far from the courts having always considered the construction of levees under statutory authority as matters of police, they too felt the influence of the progress, and manifested a disposition to restrict the abuse as much as possible.

It illustrates the development of a people, as other peoples have developed in manners and morals, and customs and laws, from the primitive people who occupied a narrow strip on the shores of the Mississippi river, governed by the laws and customs which they had brought with them from France and Spain, to the commonwealth of to-day, a member of the United States, and governed by those principles in the Federal and State Constitutions which have been adopted for protection and security to the rights of the individual as against the government, but however interesting as a matter of history, it can have no bearing on the issues in this cause.

The former laws were all repealed after the late war, and a new and different system adopted, by which the State undertook the duty of making and repairing levees. Police Jury vs. Tardos, 22 Annual, 58; Surgi vs. Mathews, 24 Annual, 613. The Constitution of 1868, Article 110, contained the same provision that "vested rights should not be divested, unless for purposes of public utility and for adequate compensation made."

The case of Bass vs. State, 34 Annual 494, arose and was decided under that Constitution, and the Court held that private property could be taken for public use, in the exercise of the general police powers of the State, without making compensation therefor. In 1879 the people adopted a new constitution, and in that appears for the first time the provision in the words of the Fifth Amendment to the Constitution of the United States, and of so many of the States, that "private property shall not be taken (nor damaged) for public purposes (use) without just (and adequate) compensation (first paid)."

This provision had at that time been construed by this Court and by the courts of many of the States, and it had come to be understood that the exercise of the police power, as distinguished from the right of eminent domain, was a matter of public law, rather than a matter of legislative or judicial discretion. The Constitution of Mississippi contained the provision that private property shall not be taken for public use without just compensation being first made. In the case of Penrice vs. Wallis, 37 Mississippi 172, the same argument was used, that the

Levee Commissioners could take private property for the purpose of making public levees, without compensation. The Court said: "In cases of public emergencies, such as the calamities of fire, flood, war, pestilence and famine, private property may be taken and applied to public use without just compensation being made therefor, upon the principle of imperative necessity for the public protection; but in order to justify such appropriation, the necessity must be apparently present, and the apprehended danger must be so imminent and impending, as not to admit of the delay incident to legal proceedings for the condemnation of the property."

The Constitution of Wisconsin provided that "the property of no person shall be taken for public use without just compensation therefor." In construing this provision in Pumpelly vs. Canal Co., *supra*, this Court said: "We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked, that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers and other highways for the public good, there is no redress; and we do not deny that the principle is a sound one in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not without sound principle."

It would naturally appear that the framers of the Louisiana Constitution of 1879, in adopting the provision in words which had received a settled construction,

adopted the existing interpretation, rather than one founded on a principle of the Spanish and French laws, which had been in part abandoned for the parish of Concordia as early as 1829, and altogether abandoned for the parish of Tensas in 1848, and which is in conflict with the spirit of our institutions.

Moreover, although it is not directly at issue in this cause, the Court can take judicial notice of the fact that the public levees of the State, on the shores of the Mississippi river, are now a part of a system of public works undertaken by the United States for the improvement of the navigation of the river, and incidentally in co-operation with the State, for the protection of the country from overflow, by confining the waters of the river, and that such levees, whether made by the United States or by the State, are parts of one and the same system, and are planned and executed for both purposes.

In Pumpelly vs. Canal Co., *supra*, it was alleged that the title came to the plaintiff burdened with an easement in favor of improving the navigation of the Fox river, which authorized the injuries complained of, and of which, therefore, he could not complain. The Court said: "We do not think it necessary to consume time in proving that when the United States sells land by treaty or otherwise, and parts with the fee by patent without reservations, it retains no right to take that land for public use without just compensation, nor does it confer such a right on the State within which it lies; and that the absolute ownership and right of private property in such land is not varied by the fact that it borders on a navigable stream." It is alleged in the bill, and not denied in the answer, that the plaintiff owns the lands in fee through titles derived by patent from the United States without reservations. Whatever may have been the conditions of the ancient grants, no such condition attaches to his ownership, and the lands, although bordering on a navigable stream, are as much within the protection of the constitutional principle awarding compensation as other private property.

The doctrine was stated by this Court in the case of Parker vs, Bird, "The courts of the United States will construe the grants of the general govern-

ment without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property by the grantee."

In the case of Bass vs. State, the State Supreme Court boldly stated that private property may be taken for public use, in the exercise of the general police powers, without making compensation therefor, and that the article of the code rested upon that foundation.

The Judges of the United States Circuit Court, in Hollingsworth vs. Parish of Tensas, 4 Woods, U. S. Circuit Court Reports 280, considered that the exercise of the police powers of the State, and the right of eminent domain, were questions of general jurisprudence, and not of local law, and held that according to the principles of general jurisprudence, private property could not be taken or damaged for public use without compensation, either by authority of the police powers of the State, or under the right of eminent domain. This opinion remained the law of the Federal Court until the decree in this case, but the State Court adhered to its doctrine that property can be taken, damaged and destroyed without compensation, for the purpose of making and repairing public levees, in the exercise of the police power.

If any doubt could ever have existed that the distinction between the police power and the right of eminent domain is a question of general jurisprudence, and not of local law, such doubt has been solved by the prohibition of the Fourteenth Amendment, that no State shall deprive any person of property without due process of law. As said by this Court in Pumpelly's case, the just principles of the common law on this subject have been placed beyond the power of the States to change or control them. What is due process of law is not a question of local or State law, but a question of Federal law, and the customs of the French and Spanish colonists, and the law and policy of the territory, and State, before the adoption of the amendment, are no more pertinent to the discussion than the

doctrine of State sovereignty, or the Black Code, or any other question which has been settled by the amendments to the Federal Constitution.

Perhaps no definition is more often quoted than that given by Webster in the Dartmouth College case: "By the law of the land is most clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry, and renders judgment anly after trial." The meaning is that every citizen shall hold his life, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgment and decrees, not to declare the law or administer the justice of the country."

Cooley's Constitutional Limitations, 353.

The words "due process of law," as used in the Federal Constitution, do not mean the law and jurisprudence of the State by which the wrong is worked. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would say to the States, you shall not deprive any person of property without due process of law, but you shall be the judges of what is due process of law; in other words you shall not do the wrong unless you choose to do it.

In Bank of Columbia vs. Oakley, 4 Wheaton 235, this Court said: "As to the words from Magna Charta incor-

porated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this—that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

When the government, through its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of proceedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession ; but when property is appropriated by the government to public uses, or the legislature interferes to give direction to its title through remedial statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means such an exertion of the power of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.

Cooley's Constitutional Limitations, 356.

It was in recognition of this principle that, in Head vs. Amoskeag Manufacturing Co., 113 U. S. 9, this Court said: "And by providing for an assessment of full compensation to the owners of lands flowed, it avoids the difficulty which arose in the case of Pumpelly vs. Green Bay Co., 13 Wallace 166. Being a constitutional exercise of legislative power, and providing a suitable remedy, by trial in the regular course of justice, to recover compensa-

sation for the injury to the land of the plaintiff in error, it has not deprived him of his property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States."

It has never been doubted that the taking of private property from one person for the private use and benefit of another person would be a taking without due process of law. Cooley's Con. Lim., 357.

And it has never been doubted that the taking of private property for public use, without compensation, except in the exercise of the police power, would be a deprivation of property without due process of law.

Kawkana Water Power Co. vs. Green Bay and M. Canal Co., 142 U. S. 254.

To determine under what circumstances property can be taken in the exercise of the police power, as distinguished from the right of eminent domain, this Court does not look to the jurisprudence of the State, but to the settled maxims of law, always understood to have been adopted for protection and security to the rights of the individual as against the government. The maxim, "*Sic utere tuo ut alienum non loedas*," is that which lies at the foundation of the power, and it is distinct from the right eminent domain.

These police powers rest upon the maxim "*salus populi est suprema lex.*" This power to restrain a private injurious use of property is very different from the right of eminent domain. It is not taking private property from the owner, but a salutary restraint on the noxious use by the owner contrary to the maxim "*Sic utere tuo ut alienum non loedas.*"

Dillon, Mun. Corp., par. 93.

There are cases where it becomes necessary for the public authorities to interfere with the control by individuals of their property, and even to destroy it, where the owners themselves have fully observed all their duties to their fellows and to the State, but where, nevertheless, some con-

trolling public necessity demands the interference or destruction.

A strong instance of this description is where it becomes necessary to take, use, or destroy the private property of individuals to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or other great public calamity. Cooley's Con. Lim. 594.

The cases in which private property can be taken, used or destroyed, in the exercise of the police power are well defined, and the authorities are all agreed that there must be an imperative necessity.

In Penrice vs. Wallis, 36 Miss. 172, it was argued that the right to use a portion of a man's land, to keep away the raging and destroying flood of the Mississippi, to prevent the spread of its devastating influence, and to protect the community from the great loss which it might and would sustain, is certainly as clearly within the common law principle as the tearing down of a man's house to prevent the spread of a conflagration.

The Court said : " not unless it could be made to appear that the case falls within the principle of necessity, or of public protection, which demands immediate action, and cannot be made to await the delays necessarily incident to judicial proceedings. It is readily conceded that such public emergencies may exist as will admit of no restraint. Such are the calamities of fire, of war, of pestilence, of famine, where the great principles of selfpreservation are as important and applicable to states or communities as to individuals. And the same principles are equally applicable to impending imminent danger from flood as from fire. But in either case, to justify the abandonment of all attempt at legal redress, the imperative necessity must be at least apparently present. As long as there is ample time and opportunity to resort for remedy to the aid of the law, the plea of necessity affords no excuse, because of its falsity."

The case was decided upon a question of general jurisprudence, and not, as counsel for defendants have erro-

neously supposed, upon a question of local law, peculiar to the jurisprudence of Mississippi. Nor is it true to say, as counsel have said, that it is a matter of public policy, which each State can determine for itself, since the public policy of the states is now subordinated to the requirements of the Federal Constitution.

It is a question which must be determined by the settled maxims of law, and those maxims do not permit that what must be done in the State of Mississippi in the exercise of the right of eminent domain, can be done in the State of Louisiana in the exercise of the police power.

The State Court, and counsel for defendants, have evidently confounded the " public necessity," which justifies the exercise of the right of eminent domain, with that imperative necessity, admitting of no delay, which alone can justify the taking, use or destruction, of private property in the exercise of the police power. The very statement of the proposition that the State, and indirectly the United States, can take, damage and destroy private property on the shores of the Mississippi river, without compensation, in the exercise of the police power, because it is needed for a system of public works undertaken for the reclamation of swamp lands, and the protection of property from the effects inundation, bears its own refutation.

This Court can take judicial cognizance of the fact that the Yazoo basin, in the State of Mississippi, has a front on the east bank of the Mississippi river of near four hundred miles, and almost equal to the Tensas and Atchafalya basins, in the State of Louisiana, on the the west bank.

The laws and jurisprudence of Mississippi show that the inhabitants of this basin have for many years maintained a system of levees, extending from near Vicksburg, Mississippi, to the neighborhood of Memphis, Tennessee, without aid from the State, and without violating or being allowed by the courts to violate the settled principles of constitutional law by taking, damaging and destroying private property for public use without compensation,

for the injury to plaintiff's property, the compensation should have been first paid, and the defendants were proceeding to take, damage and destroy the property of the plaintiff, in violation of the Constitution and laws of the State.

In either case the plaintiff had a plain right to the equitable remedy by injunction, and the more so, because he would have had no remedy at all against the State, for the torts of its officers and agents.

The District Judge, with too much regard for the public interest, and too little regard for private right, allowed the defendants to proceed to construct the levee, by an *ex parte* order, upon their furnishing bond and security in the sum of only four thousand dollars.

This was manifest error, as just and equitable compensation had not been first made, and the plaintiff is left without a remedy, except by an action at law on the bond, and a personal action against the defendants for the balance.

It is therefore respectfully submitted that the judgment appealed from should be reversed, and the injunction reinstated, and the right of plaintiff to recover his compensation for the injury by an action on the bond, and by a personal action against the defendants, be recognized and reserved, and the cause remanded for further proceedings.

WADE R. YOUNG,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

No. ~~330.~~ 12

WM. B. ELDRIDGE

versus

PETER J. TREZEVANT ET AL.

Appeal from the Circuit Court of the United States for the Western District of Louisiana.

BRIEF FOR APPELLEES.

M. J. CUNNINGHAM,
Atty. Gen'l of Louisiana.
T. M. MILLER,
Of Counsel for Appellees.

Thomason, Print, 526 Natchez Street, N. O.

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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

The appellant, complainant in the court below, brought his bill to enjoin the construction of a levee on and over his plantation, called "Fairview," in East Carroll Parish, Louisiana, averring that the State Board of Engineers, in the exercise of a power conferred upon it by the laws of the State, had located a line of public levee through the plantation at a distance of more than a half mile from the bank of the Mississippi River, and a contract for the con-

struction of said levee had been let to the appellee, Trezevant, his associates and others and partners. That said contractors were about to enter and trespass upon the said plantation, for the purpose of building said public levee, and to take the land for right of way and barrow pits, and to obstruct the canals and ditches and drains so as to dam up and overflow the lands by preventing the flow of the waters, and to place thereon superinduced additions of water, earth, sand, and other material, so as to render said plantation unfit for cultivation and habitation, and thus to take, damage and destroy complainant's property without just and adequate compensation. The bill proceeds to insist that such taking is in contravention of Section 1, Art. 14 of the Constitution of the United States, as a deprivation of property by the State, without due process of law, and also in contravention of Art. 156 of the Constitution of Louisiana, providing that private property shall not be taken nor damaged for public purposes without just and adequate compensation first paid.

Averring that notwithstanding such prohibition, the laws of the State, as construed by the State Supreme Court, provide no remedy for just and adequate compensation, complainant also alleges that his title came to him from the United States by patent without reservations. The remainder of the bill is an argument, with citation of cases. Record, pages 1 and 2.

A temporary injunction was granted but subsequently bonded, and the work carried to completion. Record, page 7.

Appellees, the State Board of Engineers, and Peter J. Trezevant, the contractor, answered :

The State Board of Engineers was created by an Act of the General Assembly of the State of Louisiana, approved February 14th, 1879, known as Act No. 33 of the Acts of 1879. That said Act made it their duty to make a careful survey of the water courses and public works and levees of the State, said survey to be completed as soon after the subsidence of high water as practicable, in order that contracts for work might be let out at the earliest moment. That they should report to the Governor the improvements necessary, and the levees to be constructed, "which are of prime importance to the State at large, and beyond the means of parochial authorities;" that they should also furnish estimates and specifications of the work necessary to be done; that upon receipt of said report it was made the duty of the Governor to let out contracts for the improvements and levees to the lowest responsible bidder;

That the said Board of State Engineers, in the discharge of the duties devolving upon them, honestly and conscientiously, and not acting in any arbitrary or unjust spirit, performed their duty for the best interests of the State at large, reported to the Governor, and furnished estimates and specifications of the work necessary to be done, on and across "Fairview" plantation; that the levee to be constructed was one of prime importance to the State at large, of large size, and that the river front was a dangerous and constantly caving bank, and that necessarily the levee had to be located some distance from the river, and the impending danger of the caving bank and a disastrous overflow of the waters from the River;

That the Governor of the State, in compliance with the law aforesaid, did award the contract for constructing the

levees recommended, with estimates and specifications by said Board of State Engineers, to the respondent, Trezevant.

Appellees (defendants) denied that they were trespassing or had trespassed upon the property right of complainant, or that he had been legally damaged; and averred that, if he had suffered any wrong, it was *damnum absque injuria;* that if any property had been taken or damaged, the 1st Section of the 14th Amendment to the Constitution of the United States did not apply, nor had it been violated, nor had Article 156 of the State Constitution been violated; averred that complainant, at the time the work was done, held and still holds the property, which is adjacent to the Misssissippi River, subject to a servitude imposed by the laws of the State of Louisiana for public utility, and that the construction of the levees, of prime importance in the State, to the State at large, is a matter within the police power of the State, and vital to the welfare and protection of the lives and property of the people of Louisiana. Record, pages 9, 10 and 11.

The facts stated in this answer were admitted, it being agreed by the counsel that the cause should be tried upon the issues of law presented by the bill and answer, and the admission that none of the acts complained of in the bill were wanton, malicious or arbitrary. See agreement, page 12. Complainant's bill was dismissed upon the ground stated in the decree, that the matters complained of were, under the jurisprudence of Louisiana, *Damnum absque injuria.*

Points of Law.

While no written opinion was delivered by Mr. Justice Lamar and Judge Pardee, the following are submitted as the propositions of law involved in the decision of this cause:

1st. The land of complainant, being adjacent to the Mississippi River, was subject to a servitude imposed for the public or common utility, under the civil law prevailing in Louisiana, for making and repairing levees, to prevent inundation.

2d. This servitude existing, a case of *appropriation* under the police power of the State, and not a case of *expropriation* by virtue of the right of eminent domain, is presented.

3d. Neither the 14th Amendment to the Federal Constitution nor Article 156 of the Constitution of Louisiana is infringed by subjecting riparian lands in that State to a servitude imposed by law, or in taking lands to build levees, and thus averting danger from inundation.

4th. It is not material that complainant's land came by patent from the Government of the United States, the State law operating uniformly on riparian property in the same situation.

Argument.

In ultimate analysis the questions involved in this litigation are very simple:

The State of Louisiana claims the right to build levees across riparian lands, without compensating the owners for the lands so taken.

To the attempt to exercise this right the plaintiff in the

present case objected, on the ground that it involved *the taking of his property without compensation*, and was therefore in conflict with the cited provisions, both of the Federal and of the State Constitutions, relative to the taking of private property for public purposes.

In answer to this contention the State, in substance, asserts that two fallacies underlie plaintiff's position, viz:

First. In his assumption that the 14th Amendment to the Federal Constitution, forbidding the States to take private property *without due process of law*, is the same in purpose and effect as the constitutional provision in the 5th Amendment, which forbids the taking of private property for public purposes *without compensation to the owner.*

Second. In his assumption that the building by the State of levees over riparian lands involves any *taking of property* at the time of the building, The fact is that riparian lands in Louisiana, from the very moment of their severance from the public domain, have always been subjected by law to a servitude entitling the State to build levees over them when and where she saw fit. In other words, the rights of private ownership in riparian lands in Louisiana have always been limited by the servitude reserved in favor of the State. When, therefore, the State builds the levees over such lands, she does not proceed by virtue of a right then resumed and taken back from the owner, but by virtue of a right which she had never parted with, and which was as fully vested in the State as the other rights of ownership were vested in the private owner. The title of the private owner of riparian lands is, therefore, from its very inception, less complete than the title to

other lands, in respect of the right reserved by the State to build levees over the former.

It is not denied by appellant's counsel that before the State of Louisiana was admitted into the Union the law and public policy there subjected riparian lands to a public servitude for the making and repairing of levees; nor is it denied that the principle of servitude continued to exist up to the date of the adoption of the Louisiana Constitution of 1879. It is conceded that as far back as 1829, and prior thereto, throughout all that portion of the State watered by the Mississippi and the bayous running to and from the same, which were settled, where levees were necessary to confine the waters and to protect the inhabitants against inundation, the levees were required to be made by the riparian proprietors in certain proportions, and that each levee was considered as the continuation of one great plan for the preservation of the cultivated fields of the inhabitants.

The counsel's theory is, that while this was the ancient law, and while well adapted to a primitive people dwelling along those shores, from the standpoint of constitutional law, it becomes odious, and in view of Article 156 of the Constitution of 1879—declaring that private property shall not be taken without just and adequate compensation—the principle of riparian servitude, although preserved always in the laws of Louisiana (with different modifications), has ceased to exist.

How and when this servitude disappeared is not made plain, but it is argued that because in one local Act provision was made for compensation (in presumably exceptional circumstances), the entire principle was abandoned. And the

argument is also advanced, in the face of the decisions in *Zenor vs. Concordia Parish, 7 La. An. 150,* and *Dubose vs. Levee Commissioners, 11 La. An. 165,* that because Article 109 of the Constitution of 1845 and Article 105 of the Constitution of 1852 declared that vested rights should not be divested, unless for purposes of public utility and for adequate compensation, the law of servitude became extinguished for repugnancy, as if the exercise of an undisputed and unqualified sovereign right, reserved always, could divest a vested right.

It is said that in neither of the cases last cited was allusion made to the constitutional provision for compensation, but in the first, decided in 1852, it was said: "In this State, so much exposed to ruinous inundations, the public have the undoubted right, on the shores of the Mississippi River, to the use of the space of ground necessary for the making and repairing of the public levees and roads;" and again, "*Salus populi suprema lex* is the rule, and in the exercise of it individuals can claim indemnification only when they have shown, clearly, that they have been deprived of their rights." And in the Dubose case it was declared that the law concerning the expropriation of private property for public use had no application to such lands on the banks of navigable rivers as might be found necessary for levee purposes, which is tantamount to saying that the requirement of the Constitution had no application where an unqualified public right of appropriation was exercised.

It was also sought to deduce from the decisions in *Mithoff vs. Carrollton, 12 La. An. 185, Cash vs. Whittmore, 13 La. An. 401,* and *Inge vs. Police Jury, 14 La. An. 117,* that the principle of servitude attaching to lands ad-

jacent to navigable streams, and theretofore unquestioned, had been abandoned in the course of the "development of a people from the primitive people who occupied a narrow strip on the shores of the Mississippi, govérned by the laws and customs which they had brought with them from France and Spain, to the Commonwealth of to-day, governed by the principles in the Federal and State Constitutions for the security of private rights against the encroachment of government." But the cases cited do not in any degree sanction the idea. They each affirm and reaffirm the existence of this servitude for levees as the condition upon which lands bordering streams, and subject to inundation, are held in Louisiana, and an incident of such ownership. There is no departure in the decisions before or since the adoption of any of the constitutions cited by counsel from this essential feature of the civil law.

In the Mithoff case, while the servitude was declared to exist, it was only held that in a case where, before land had become subject to it—that is to say, before the land became adjacent to the river—the owner had constructed buildings upon it, and the pulic should, afterwards, when the land came to be adjacent to the river, in the exercise of the police power, proceed to appropriate part of it toward the erection of a public levee, he must be compensated for the buildings. It is difficult to harmonize this decision (conflicting also with the late case of *Bass vs. The State*), allowing for the buildings, with any known principle, and we think the dissenting opinion demonstrates its error. It was placed upon the ground that the owner at the time he erected the buildings owed no immediate servitude, and therefore they had not been put up in violation of any law. Said

the Court: "When so erected, the buildings were *theirs* in the highest sense of the term, and the property thereof, being vested in them, as such owners they were protected from an expropriation, in order to arrive at the servitude which the land came to owe, by the Constitution, which requires compensation to be made in such cases." It was further said, in that case, that the town might have run the levee behind those buildings, or in front, so as not to obstruct them absolutely, and the proprietors could not complain; but when the public, by its proper authorities, chose to pull down the houses, it took from the owners something more than the mere servitude, which was due by the soil, it took part of the property itself, for which the defendant owes compensation.

The case of *Dubose vs. Levee Commissioners, supra*, which settled that the law, concerning the *expropriation* of private property for public use, did not apply to such lands upon the banks of navigable rivers as might be found necessary for levee purposes, *and that there was no arbitrary limit fixed by law as the maximum distance at which a levee might be placed back of a caving bank*, was expressly approved in *Mithoff vs Carrollton*.

In *Cash vs. Whitmore, 13 La. An. 401*, the Court merely decided that it would be a perversion of the principle of *riparian servitude*—a servitude for levees designed to prevent the inundation of the lands subject to it, as well as other lands—to require the owner of land on a bayou to surrender his land to a levee not intended to prevent inundation, but for the reclamation of swamp land at a distance. Hence, that where it was proposed to dam up a bayou by running a levee across it to free distant low lands from water, the

proprietor of the land, taken for the purpose, was held entitled to just compensation.

In that case, the ancient principle of servitude for levees over lands adjacent to the navigable rivers—such a servitude as was maintained in the case at bar, was expressly admitted.

Inge vs. Police Jury, 14 La. An. 117, involved the construction of a local statute, and is not in point here.

Counsel next insists that the principle of servitude was abandoned by the repeal of the ante-bellum laws regulating it, and cites, *Police Jury vs. Tardos, 22 La. An. 58*, and *Surgi vs. Matthews, 24 La. An. 613*, but, by reference to those cases and the legislation alluded to, it will be found that the old method of requiring the riparian proprietor to keep up his levees, and in default charging the cost of the work upon his plantation, was simply replaced by the State itself undertaking a work which had become too onerous in their altered circumstances for the riparian proprietors themselves.

Both cases were actions against riparian proprietors to recover the cost of constructing levees ordered by the parochial authorities. The question of servitude was not raised in either, and the decision was that the former law, authorizing the parish authorities to cause such work to be done, had been repealed by the legislation adverted to.

In the Tardos Case, decided in 1870, the Court said: "The legislation on the subject of levees, since the late war, has manifestly been framed with reference to the great changes which have been wrought in the condition of the country by the war. The vast expense formerly imposed upon the riparian proprietors of building the heavy

embankments necessary on the Mississippi, and to make continuous repairs upon them, would now, under the altered state of affairs in regard to capital and labor, be utterly ruinous. Hence, the policy was a wise one to relieve that class of our people by a change of the laws and regulations in respect to the levee system."

Speaking of *Bass vs. The State, 34 La. An. 494*, counsel says that, notwithstanding the declarations of the Constitution against the taking of private property, without compensation, the Court in that case boldly announced that it could be done. Referring to the case itself, it will be observed that the very eminent counsel who represented the plaintiff admitted the servitude for levee purposes and only claimed that *it was subject to judicial control* to prevent abuse of the power, and that he was entitled to damages in consequence of the manner in which the levee was constructed.

The points stated for consideration by the Court are:

1. Whether the State has the right to determine the propriety, location and mode of building levees on the banks of navigable rivers within her territory, and whether, after she has so decided and has contracted therefor, a citizen, on whose land the levee is to be built, can require it to be constructed differently.

2. Whether, in case of non-compliance with his demand by the officers in charge of the work and of damages thereafter sustained by him, he can hold the State liable for the injury thus suffered.

The opinion in that case is exhaustive—dealing with the entire principle involved. It maintains that rights of property, like all other social and conventional rights, are

subject to such reasonable limitations as the Legislature, under the governing and controlling power of the Constitution, may think necessary and expedient; places levee building along the Mississippi river in the alluvial regions of Louisiana within the police powers of the State, where a controlling public necessity demands interference or destruction, as within the principle which justifies the taking or destroying of private property to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army or *any other great public calamity*. "*Necessitas publica major est quam privata*."

The opinion then declares that, "the laws passed for such purposes, it is well settled, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no compensation is made. They do not appropriate private property for public use, but simply regulate its enjoyment by the owner. If he suffers injury, he is compensated, in the theory of the law, by sharing in the general benefits which the regulations are intended to secure. Those regulations rest upon the maxim: *Salus populi suprema lex*."

And here it is submitted, that, considering the ancient laws, compelling the proprietor to build and keep in repair the necessary levee over his own land, under public supervision and direction, were maintainable and maintained upon the above principle, he cannot complain that the State has taken the burden from his shoulders in the legislation made expedient by his own altered circumstances.

It is shown that in the early days of the State, the levees were made and kept in repair at the joint expense of the front proprietors. The law and clauses in the original

grant burdened those who were contiguous on the river with the construction and repair of the road, ditches, bridges and the levee, reference being made to Martin's History; Dumont; Gayarre's History, v. ii, p. 2; Ordinance of O'Reilly (Spanish Governor), Feb. 18, 1770, and other authorities.

In the Bass case, the opinion in *Dubose vs. Levee Commissioners, supra*, is quoted with *approval* as follows: "To reconcile the controlling interest of the public with the subordinate interest of the individual is ever a delicate problem. When they come in conflict the latter must yield. The safety of the public has first to be consulted. The law concerning the expropriation of private property for public use does not apply to such lands upon the banks of navigable rivers as may be found necessary for levee purposes. The quantity of land to be taken for such purpose presents a question of police and administration. * * *"

Again quoting from the case in *12th La. Annual*, referring to the Levee Act of 1829, the Court said: "The object of the act is apparent. It is a matter of public necessity to shelter the inhabitants against inundation. As the property would be of no value without the levees, the Legislature had the power to compel such riparian proprietors to make those levees and roads in front of their plantations without further compensation than the increased value which such works would confer on their own lands."

The Court concluded that the Act of 1877, being the same substantially as that assailed here, was in no sense in conflict with the Constitution of the State. And from it and the authorities cited it appears that antedating the

14th Amendment to the Constitution of the United States, and the adoption of the State Constitution, here invoked, this riparian servitude existed, and the exercise of State authority in the premises was established as part of the police power—the public safety requiring it. Yet counsel seeks to maintain that the guaranties of the Constitution, State and Federal, are sought to be avoided by simply a change of terms; that the law relating to expropriation for public use should prevail, and would, but for an evasion through the invocation of police power.

So far as the question of infringement of the State Constitution is concerned, the decision of the State Supreme Court is binding, for any other ruling might make one law for the citizens of the State and another for citizens of other States who could have access to the Federal Courts. So this Court deals only with the question whether a given Act of a State Legislature, as construed by the State Courts, conflicts with the Federal Constitution, and then, before it will nullify the Act, requires that the conflict shall be manifest.

It may be said further, that where given legislation is assailed, as here, upon the ground that no just compensation is provided for a taking, by the State, the 14th Amendment has no sort of application, for in stretching the 5th Amendment so as to touch Acts of State Legislatures, the clause in relation to compensation was omitted. *Davidson vs. New Orleans, 96 U. S. 97.*

In examining the argument of appellant's counsel thus far, the propositions of law contended for by appellees have been incidentally maintained and found to be supported by the cases criticised. In further support of the

propositions that the servitude for the making and repairing of levees rests upon all lands adjacent to the Mississippi River, in Louisiana, and that its exercise by the State is referable to the police power, and not the right of eminent domain, and that any injury done the owner is *damnum absque injuria*, attention is requested to the decision of the Louisiana Supreme Court in *Ruch vs. New Orleans, 43 La. An. 275.* The question involved was the right of way reserved in the Civil Code, but what is said in the opinion applies with greater force to the servitude for levees upon the existence of which depends, not alone the health but the personal safety of the inhabitants dwelling behind them. In that case, the plaintiff contended that the Constitution forbade the taking of his land for a roadway without compensation. The Court held that there was no right to compensation, because the right of appropriation proceeds upon the principle that the riparian owner enjoys his property *sub modo ; i. e.*, subject to the right of the public to reserve space enough for levees, public roads and the like ; that over this space the front proprietor never acquires complete dominion ; that it never passes free of this reservation ; that the taking of the plaintiff's property by the city to the extent the same might be required for public use, in the enlargement of the public roadway immediately in front of it, could be done in virtue of the right of *appropriation* vested in her by the police power of the State ; that this right of appropriation is and was co-existent with the right of expropriation as provided for in the Revised Civil Code and Revised Statutes.

The Court declared that all those provisions of the Code,

for the *appropriation of riparian property* and the *expropriation* of property, pre-existed the Constitution of 1879, and that of itself led to the supposition of their entire compatibility; that the two principles were of well recognized and ancient origin—one being an exercise of the police power, any loss sustained thereby entitling the injured party to no recompense, the same being *damnum absque injuria;* the other being the exertion of the right of eminent domain, the damages entailed being compensable; that the provisions of the Constitution placing restrictions upon the exercise of the power of expropriation had no reference to the *police power* of the State; that the latter is necessarily an inherent and reserved power of a State. In the same case the Court says that the ownership of riparian rights has been thus subordinated to public use from time immemorial is attested upon the authority of text writers, and the French Code. "Domat says the banks of rivers, highways, etc., are things public, the use of which is common to all particular persons. But it is the sovereign that regulates them."

"The text of the French Code is: a servitude established for the public benefit or that of the commune, has for its object, footways by the side of navigable rivers, * * * the construction or repairs of roads and other public works, or those relating to the commune." Code Napoleon, Arts. 650, 556.

And Justinian is referred to as saying: "The banks belonged to the proprietor of the adjacent soil; but the use of them, for the purposes of navigation and otherwise, was open to all. The proprietors, therefore, could alone reap the profits of the soil; but, if they attempted to exercise

their rights so as to hinder the public use of the bank, they would be restrained by the interdict of the prætor." Lib. 11; Tit. 1, p. 159. To Cicero is ascribed the expression that, "the public use of the banks of a river is part of the law of nations."

The Revised Civil Code of Louisiana provides that servitudes imposed for the public or common utility, relate to the space which is left for the public use, by the adjacent proprietors on the shores of navigable rivers, and for making and repairing levees, roads and other public or common works." R. C. C. 665. This has confessedly been the law in Louisiana from the earliest times and that provision, in substance, is found in all her codifications of the civil law.

In some of the cases cited, it is held that the maximum distance is not defined to which the levees may be removed from considerations of safety. The answer here avers that the levee was set back necessarily on account of a *rapidly caving bank* and the *impending danger of a disastrous overflow*. The truth of the answer isadmitted.

See also *Peart et al. vs. Meeker, 45 La. An. 421* (1893), where all the cases on this exercise of police power are summarized, and in which the Court says: "It is useless to quote from these decisions. They are familiar to the profession, and their language is unambiguous, harmonious and emphatic. They were rendered under the regime of constitutions which prohibited the taking of private property for public purposes without compensation, and however broad and emphatic may be the same provision in our existing Constitution, it had not either the intention or effect to repeal Art. 665 of the Civil Code, or to bring within its

grasp the lawful appropriation of property for levee purposes. On the contrary, the Constitution itself charges the General Assembly with the duty of maintaining a levee system."

As regards the proposition that the 14th Amendment of the Federal Constitution controls the States in the taking of property, under the police power, for public purposes.

The building of levees across riparian lands involves, not the taking or re-acquisition of property by the State, but simply the enforcement of a reserved right, to the exercise of which the lands were at all times subject. Waiving, however, for the present, the discussion of this point, we now merely call attention to the plaintiff's mistaken assumption regarding the scope of the 14th Amendment, and its bearing on the present case.

The 14th Amendment simply forbids the States to "deprive any person of property *without due process of law.*" It does not undertake to prescribe in what due process of law shall consist. It merely requires some process which shall be equal and impartial to all, and shall operate in the same general manner upon the rights of all. Any process that complies with these requirements satisfies the 14th Amendment.

Neither does the Amendment undertake to prescribe any conditions to the divestiture of titles or the transfer of property. It does not declare that a vested title shall not be divested except upon compensation made to the owner. Provided the process which governs the transfer or divestiture of property is regular, uniform and impartial in its operation, the other conditions, as to compensation, etc., are left to the States to determine.

That the sole object of the provision in the 14th Amendment was to secure a uniform and impartial procedure, affecting in the same way all who may be in the same situation, is shown by a comparison of it with the corresponding provisions in the 5th Amendment. The 5th Amendment was intended as a limitation on the exercise of the powers confided to the Federal Government, and the 14th Amendment was a limitation on the powers of the State Governments. Now, the 5th Amendment provides both that no one shall be deprived of property *without due process of law*, and also that private property shall not be taken for public use *without just compensation*.

This clearly shows that the requirement of due process of law is a different matter from the regulation of the taking of private property for public purposes, under the the police power inherent in every government. But the 14th Amendment deals solely with the question of due process of law.

If, then, the process by which the State of Louisiana exercises the asserted right to build levees over riparian lands is uniform and the same for all persons thereby affected, it must then follow that no right secured to the plaintiff by the Federal Constitution has been violated.

Now, the manner in which the State determines on the necessity for constructing or reconstructing or changing the lines of the levees, is absolutely the same towards all riparian owners. The power is exercised, under general laws, through the State Board of Engineers. The proper location of the levees is necessarily committed to the discretion of the Engineers. And as they are very often called upon to act in great haste, it was necessary that

they should act both in a judicial capacity and as their own executive. The system is on the whole fair and impartial and has worked satisfactorily for nearly a century. The contention that the plaintiff's rights under the 14th Amendment have been violated, is then, we submit, ill-founded.

When it is considered that the richest and most populous region of Louisiana is alluvial land made in the course of centuries; that without levees it is all subject to annual inundation from the Mississippi, which receives the waters from many States and territories; that not alone would the front plantations be valueless, but all the people who dwell behind the levees would be exposed to danger to their lives even, and the country, in fact, rendered uninhabitable; that in the exercise of the police power and in subjecting riparian lands to a servitude, always reserved, the courts of that State are open to prevent arbitrary abuses, as has been repeatedly declared—what becomes of the counsel's appeal against spoliation?

Considering the necessity of every alluvial land owner to protect his land and home against the floods, is it not perfectly certain that if the State did not undertake the protection he would protect himself as best he might or abandon the country? Is it not certain that, if able and allowed to build his own levees, he would go far enough back from the caving banks to assure permanency? and would he not employ engineers, expert in the business, just as the State does? Why, then, does counsel talk about confiscation of private property?

It is denied that this Court has ever given an utterance that would sanction the idea that such an exercise of

a State's reserved police power, as here shown, is forbidden by the 14th Amendment to the Federal Constitution.

The decisions of this Court, cited by counsel, did not deal with such questions as are involved in the case at bar, but with matters of expropriation proper. Touching the effect on State legislation of the 14th Amendment, this Honorable Court has declined the attempt, even, to lay down any fixed rule or limit, holding that the annunciation of the principles which govern each case, as it arises, is the better mode of arriving at a sound definition.

Davidson vs. New Orleans, 96 U. S. 97. And in *Barbier vs. Connelly, 113 U. S. 27,* it was held that the 14th Amendment does not impair the police power of a State.

In the latter case it was said: "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having those objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains."

In exercising the servitude always imposed on riparian lands in Louisiana, it is submitted that the entry upon the land and surveying the route is "such proceeding in regard to the property as is appropriate to the nature of the case," and it is immaterial that the statute fails to provide a remedy against the wanton, unjust and arbitrary exercise of the power since the principles of the Civil Law, prevailing in

the State of Louisiana, are themselves to be taken as if incorporated into the statute, and they open the Courts against such abuses.

Mr. Tiedeman, in his treatise on Limitations of Police Power, Section 124, says: "It cannot be questioned that the owner of swamps or other unhealthful lands may be compelled to allow them to be drained and to be otherwise cleared of things which affect the public. For while the owner of lands is not responsible for the continuance of a natural nuisance, he has no indefeasible right to its continuance; and the State may remove such a nuisance, with or without the owner's consent, provided the expense of removing it is borne by the State and not imposed upon the owner." This involves an exercise of the police power in the interest of the public health, and there is no thought of compensation in such cases, and it is difficult to conceive why upon the same principle the State may not step in and prevent danger to life and health by erecting a barrier against floods from natural causes and incidentally rendering valuable the land in question and all adjacent lands.

The constitutionality of legislation providing for the compulsory drainage of swamp lands has generally been sustained as a reasonable exercise of the police power of the State even on the general ground that the State may impose upon the owner the duty of draining his low lands, in consideration of the consequent increase in the value of his lands.

Tiedeman on Limitation of Police Power, Sec. 124, and authorities cited.

If the State in the exercise of her police powers in the

interest of public safety may impose a duty on a landed proprietor, it is hard to conceive why she may not assume the duty herself—subject to his right to prevent a wanton and unnecessary invasion of his property rights.

We think it patent that the levee laws in Louisiana, without which no part of complainant's property would have value or be habitable, are not an unrighteous exercise of police power from the standpoint of a most jealous scrutiny, so there is no call for an "overstrict construction."

Mr. Tiedeman in the same work, at Section 3, quoting the language of Mr. Justice Christiancy in *People vs. Jackson and M. Plank Road Co., 9 Mich. 285*, says: "Powers which can only be justified on this specific ground (that they are police regulations), and which would otherwise be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, comfort and well being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it." Such, it is submitted, is the character of the legislation now being considered.

It is said that "where, under legislative authority, the construction of levees and embankments is required to protect from overflow and destruction considerable tracts of country, assessments are commonly levied for the purpose on the owners of lands lying on or near the streams or bodies of water from which the danger is anticipated. But if the construction should be imposed as a duty upon resi-

dents or property owners in the neighborhood, so that they should be compelled to turn out periodically, or in emergencies, and give personal attention and labor to the construction of the necessary defenses against overflow and inundation, it is not perceived that there could be any difficulty in supporting such a regulation as one of police, or of resting it upon the same foundations which sustain the regulations in cities, by which duties are imposed on the occupants of buildings to take certain precautions against fires, not for their own protection exclusively, but for the protection of the general public." See *Cooley's Cons. Lim., 6th Ed., page 732*, and authorities cited.

This statement appears to be entirely reasonable, and it would seem to follow that where not alone is damage threatened to the lands subject to inundation but the health and personal safety of the inhabitants are involved, the State may well undertake the duty of erecting the defenses which she may compel the land owners to erect.

The bill of complaint in this case appears to be based on two expressions occurring in the opinion of this Court in *Pumpelly vs. Canal Co., 13 Wall 166.* The first being: "It remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it so as to effectually destroy or impair its usefulness, it is a *taking* within the meaning of the Constitution." The second: "We do not think it necessary to consume time in proving that when the *United States* sells land, by treaty or otherwise, and parts with the fee without reservations, it retains no right to take that land for public use without

just compensation, nor does it confer such a right on the State within which it lies."

But in that case the Court was dealing with a law which provided compensation for a *taking*, with the power of eminent domain, and no question of servitude or police power was presented. We do not think there is anything in the case to warrant the idea that the exercise of an *unqualified* right could involve the deprivation of a *right*.

It has been said by this Court that it is not open to doubt that it is in the power of the State to require local improvements to be made which are essential to the health and prosperity of any community within its borders; to this end it may provide for the construction of canals for draining marshy and malarious districts and of levees to prevent inundations. *Hagar vs. Reclamation District, 111 U. S. 701.*

And the former system prevailing in Louisiana, and evidently in the mind of the Court, was incidentally approved in the same case:

"In some States the reclamation is made by building levees on the banks of streams which are subject to overflow; in other States by ditches to carry off the surplus water. Levees or embankments are necessary to protect lands on the lower Mississippi against annual inundations. The expense of such works may be charged against parties specially benefitted (although the public at large incidentally share in the benefit), and be made a lien on their property." Where not the public convenience or interest merely is the object sought by an improvement, but the public health and safety, it is submitted that the private owner has no right to prevent the necessary precautions

and safeguards being set up on his premises for their protection, and where the danger is impending; the case "where some controlling public necessity demands the interference." As said in *Bass vs. The State, supra*, this is very different from the right of eminent domain, which expropriates upon indemnity for public utility. It is the police power which is inherent to every government under its organic law, and which is exercised without making compensation.

Improvement of navigation in the interest of general prosperity is one thing; the protection of life and health quite another.

And so it is that in Louisiana these riparian rights have always been held, subject to the incidents and rights reserved by the State to prevent inundation.

Eminent domain is said to be "an incident of sovereignty and requires no constitutional recognition. The right existed prior to Constitutions. It is inherent in the State and belongs to every independent government. It is in the nature of a compulsory purchase of the property of a citizen for the purpose of applying it to a public use." These extracts are from Mr. Mills' work on Eminent Domain, taken from his "definitions and sources of power" (Section 1). And in the same chapter the distinction is pointed out between that power and the police power of the State, and it is said property may be *taken or its use interfered with* by the State, without compensation, by exercise of the police power.

Regulations which tend to benefit the public health, to remove causes of disease or public discomfort, are mentioned as legitimate exercises of this power, and, among the

numerous illustrations, it is said a riparian owner may be compelled to keep up a levee to protect the surrounding country from inundation, and if he refuses it may be kept up at his expense.

Now, the District Judge, in *Hollingsworth vs. Tensas Parish*, a case much relied on by counsel and the only one cited in point, ignored the distinction between eminent domain and police power, and placed his decision upon the notion that the latter is a power only to regulate one's own use of his property and can never extend to outside interference.

The notable feature of the Hollingsworth case is that it was an application of the 5th Amendment to the Federal Constitution, taking it literally, to State legislation, whereas the petition, according to a statement in the opinion, claimed only that the Constitution of the State was violated. His Honor seems to have felt bound by the decision of this Court in *Pumpelly vs. Green Bay Company*, construing a clause in the Constitution of Wisconsin and, therefore, overruled the Supreme Court of Louisiana. On the other hand, the Circuit Judges, in the instant case, following the precedents, concluded that views of the State Court should govern where the Constitution of the State was interpreted.

It has just been said the Hollingsworth case (17 Fed. Rep. 109) was in point. That is going a little too far, because the 14th Amendment was neither invoked nor mentioned. Nor in the case at bar is the *method* of the exercise of the police power claimed, objected to, but relief is sought solely upon the ground that no compensation is provided.

It is denied that, were this case here on writ of error to the Supreme Court of the State, any federal question would be presented. Mr. Prentice, in his work on Police Powers (page 54), treating of interference with private property, dictated and justified *summa necessitate*, and by a due regard to the public safety, says: "In like manner, a levee may be raised on private land, and in some cases an owner of land is himself required to build and maintain a levee," citing, as does Mr. Mills, a Louisiana case. It is persuasive that both these text writers, who are tender on the subject of private property rights, should give these favored illustrations of the proper exercise of police power without questioning their validity. See also *Philadelphia vs. Scott*, where it was held that a levee might be built on the riparian owner's land between high and low water mark—same being owned subject to the public right of navigation—without compensation. *Bancroft vs. Cambridge, 126 Mass. 141.*

Mr. Prentice observes that this compulsory right of interference with private property by statute is more certain than its explanation, or its conditions, in the decisions of the several States, adding, that it unquestionably belongs to the police power and must be exercised for a public object, and it does not belong to the common law, but has arisen almost universally from the new exigencies of the extending lines of population and the public service for which the Legislature, in its wisdom, makes provision by statute. *Prentice on Police Power, 55.*

This question of riparian servitude for levees and the right of the local levee commissioners in Louisiana to take the land necessary for their construction came before Judge Billings, sitting as Circuit Judge for the Eastern District of

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Louisiana, in 1893, on a bill to enjoin the taking of certain land until and except compensation should be made, and in speaking of the decision in *Hollingsworth vs. the Parish of Tensas,* his Honor said the Court had dealt with the authority to locate levees as a question relative to an exercise of eminent domain, and referring to the case at bar, says: Mr. Justice Lamar and Judge Pardee held, in substance, that the placing of levees upon riparian lands was but subjecting them to a servitude which they owed. The opinion then proceeds to maintain the exercise of the right claimed, and closes as follows: "With reference to the Mississippi River, the obligation to submit to the location of levees—the servitude that is being considered—has a much greater geographical expansion or extent than the ordinary obligations with reference to smaller streams. The obligations of the proprietor of land with reference to ordinary streams spring, as do the injuries, from the abrasion of the stream and the change of its bed; but the obligations of the proprietors of lands lying upon or in the vicinity of the Mississippi River originate, as do the dangers, not from mere abrasion of the earth and the change of the channel, but from the fact that the body of the stream is so vast, and the bulk of the water so immeasurable, that inundation and devastation are threatened upon all the low-lying lands, whether they be immediately proximate to the river or miles distant. The forced diffusion of the danger from a cause acting so resistlessly has caused the statute to impress upon the lands a servitude for a common protection equally extended. My opinion, therefore, is, that the levees of the Mississippi having been located by the legal authorities upon the complainant's

lands, notwithstanding their remoteness from the natural bed of the river, they are by statute wisely made riparian, and subject to the levee servitude, which dispenses the defendants from making compensation for the damage which the location of the levee may cause to complainant."

In this argument the first and second propositions of law stated at the commencement have been considered together, and it is submitted that the third is a mere corrollary.

4th. So far as the circumstance of complainant's title having come from the general government is concerned, that cannot exempt him from the burden common to those in his situation. He has the use and enjoyment of his property just as all others similarly placed have theirs, and which is just as complete as the nature of the case will permit.

This Court has declared that whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States.

Packer vs. Bird, 137 U. S. 661.

And in *Hagar vs. Reclamation District, supra*, where the owner of reclaimed land objected to the power of the State to subject his land to its proportion of the expense of reclamation, the Court said: "The fact that appellant's land was derived from a grant by the Mexican Government in no respect affects the question. It is the character of the land and its susceptibility of being reclaimed under one system of works, and not the source of the owner's title, which authorize action by the State. The lands granted by Mexico were not by the treaty, under which California was acquired, exempted from the control that the State exercises *over all other lands.*" (Italics ours).